No. 80-1232

In the
Supreme Court of the United States

OCTOBER TERM, 1980

THILL SECURITIES CORPORATION, *et al.*,
Petitioners,

vs.

NEW YORK STOCK EXCHANGE, INC.,
Respondent,

and

UNITED STATES SECURITIES AND EXCHANGE COMMISSION (Intervenor),
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT NEW YORK STOCK EXCHANGE, INC.

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly applied to the findings of fact this Court's decision in *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), establishing the legal principles for implying antitrust exemption to rules of a registered national securities exchange subject to the actively exercised supervisory jurisdiction of the Securities and Exchange Commission (the "SEC") pursuant to the regulatory scheme embodied in the Securities Exchange Act of 1934 (the "Exchange Act")?

2. Whether this Court should embark on an examination of the record in order to resolve various alleged "factual tests for antitrust immunity" (Pet., p. 17)?

Statement pursuant to Supreme Court Rule 28.1: Corporations affiliated with New York Stock Exchange, Inc., are The Depository Trust Company, National Securities Clearing Corporation, Newex Corporation, Newin Corporation, New York Futures Clearing Corporation, New York Futures Exchange, Inc., New York Stock Exchange (a New Jersey corporation), New York Stock Exchange, Inc. (a Connecticut corporation), Securities Industry Automation Corporation and Stock Clearing Corporation.

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STATUTE INVOLVED

Section 19(b) of the Exchange Act, as it existed prior to enactment of the Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97:

> "SEC. 19 *** (b) The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) *the fixing of reasonable rates of commission, interest, listing, and other charges;* (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters." (Emphasis added)

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UNITED STATES SECURITIES AND EXCHANGE COMMISSION (Intervenor),
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Respondent New York Stock Exchange, Inc. (the "Exchange") opposes the petition of Thill Securities Corporation, *et al.* ("Thill") for a writ of certiorari. Petitioners have failed to demonstrate any special or important reasons for review. The decision below is fully in accord with applicable decisions of this Court. The case is stale, of no current or general significance, and largely moot.

COUNTER-STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition

Petitioner Thill, a broker-dealer in securities from January 1958 through September 1964, commenced this action in 1963, challenging as a violation of sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) certain provisions of the Exchange's constitution then in effect which prohibited members from allowing non-members, including non-member broker-dealers, rebates or discounts from the Exchange's minimum commission schedule (the "anti-rebate rule").

In 1969 the District Court granted the Exchange's motion for summary judgment, holding the Exchange's anti-rebate rule exempt from antitrust attack by reason of then section 19(b)(9) of the Exchange Act, which authorized the Exchange to adopt rules "in respect of such matters as . . . the fixing of reasonable rates of commission," subject to the power of the SEC to alter or supplement such rules in order to meet objectives of the Act. 1969 Trade Cas. (CCH) ¶ 72,911 (E.D.Wis. 1969). The Court of Appeals for the Seventh Circuit (in three separate opinions) reversed and remanded, holding the record before the District Court insufficient to support summary judgment. 433 F.2d 264 (7th Cir. 1970), *cert. denied,* 401 U.S. 994 (1971).

On remand the SEC intervened and supported the Exchange's position that the SEC had been exercising regulatory jurisdiction over the anti-rebate rule pursuant to the Exchange Act. The Department of Justice also intervened, raising the same issues as those of the complaint and also challenging an Exchange rule, adopted at the behest of the SEC and implemented in March 1972, which changed the anti-rebate rule to permit a maximum discount of 40% on commissions charged non-member broker-dealers (the "40% discount rule"). During the trial, which consumed 30 trial days, petitioners' case was presented largely by a team of Department of Justice attorneys.

While the case was *sub judice,* this Court decided *Gordon v. New York Stock Exchange, Inc.,* 422 U.S. 659 (1975), holding

that the Exchange's former rules fixing minimum rates of commission were exempt from antitrust attack by reason of the regulatory scheme of the Exchange Act and active SEC review of the Exchange's rules thereunder. Shortly thereafter, the Department of Justice withdrew from this lawsuit, advising the District Court that in light of the *Gordon* decision and the Securities Acts Amendments of 1975, "no useful purpose would be served by continuing the involvement of the United States in this lawsuit." (Appendix hereto, pp. 1-2).

Subsequently, the District Court granted judgment in favor of the Exchange and the SEC and dismissed the complaint. The Court applied the principles of antitrust exemption set forth in *Gordon* to the facts of the case, as to which the Court made detailed findings based on the record. The Court found that the anti-rebate rule was an integral part of fixed commission rates (because a rebate would render the commission unfixed) and that the rule had been the subject of active review by the SEC, exercising its jurisdiction under section 19(b) of the Exchange Act as it existed prior to the 1975 amendments thereto. 473 F. Supp. 1364 (E.D.Wis. 1979).

The Court of Appeals affirmed the District Court's decision on the ground that this Court's unanimous decision in *Gordon* compelled exemption from antitrust attack where the SEC, pursuant to its statutory authority, had exercised its oversight jurisdiction over the challenged Exchange rules and separate private antitrust actions would cause "obvious interference" with the regulatory scheme of the Exchange Act. 633 F.2d 65, 70 (7th Cir. 1980). Despite challenge, none of the District Court's findings of fact was disturbed.

B. The SEC's Exercise of its Oversight Powers

The relevant facts, in the context of the Exchange Act, relating to the Exchange's former fixed commission rules are set forth in this Court's opinion in *Gordon, supra.* Summarized briefly, former section 19(b) of the Exchange Act authorized the Exchange to establish rules relating to "the fixing of reasonable rates of commission," subject to the power of the

SEC to "alter or supplement" such rules. Fixed commission rules were a part of the Exchange's constitution and were reviewed by the SEC when the Exchange first registered with the SEC in 1934. Between 1934 and 1968 the Exchange amended its commission rules five times in conjunction with the SEC. No change was made on any of these occasions in the provision—part of the commission schedules—prohibiting returns, rebates, discounts or allowances to non-members. Under section 6(a)(4) of the Exchange Act (15 U.S.C. §78f(a)(4)), the Exchange submitted all such proposed changes to the SEC. In each instance the SEC reviewed the proposed changes; in 1942 and 1958 the SEC requested the Exchange to make certain modifications, and the Exchange complied.

In 1963 the SEC completed its "Special Study" of the securities markets, a comprehensive review of the structure and operation of securities markets in the United States. "Report of Special Study of Securities Markets", H.R. Doc. No. 95, 88th Cong., 1st Sess. (1963) (the "Special Study"). After a detailed analysis of the Exchange's commission rate structure, including the anti-rebate rule, the SEC concluded that the question of economic access by non-member broker-dealers to the Exchange required further "joint Commission-Exchange study." (Pt. 2 at 350). There followed extensive formulation and review of proposals relating to non-member broker-dealer access, culminating in public investigatory hearings conducted by the SEC pursuant to section 21(a) of the Exchange Act (15 U.S.C. §78u(a)). The SEC at first opposed non-member access on the grounds that it would exacerbate so-called "give-up" practices which the Special Study had condemned. At the conclusion of those hearings, however, the SEC determined that "fixed charges [for orders in excess of a given dollar amount] are neither necessary nor appropriate," and directed the Exchange to submit a new commission rate schedule and plan for economic access. In early 1972, in accordance with the SEC directive, the Exchange amended its anti-rebate rule to permit a 40% discount on commissions to non-members who were registered broker-dealers.

In September 1974, after further public hearings on the fixed commission rate structure, the SEC exercised its jurisdiction under section 19(b) as it then existed to eliminate all fixed rates of commission effective May 1, 1975. The SEC subsequently adopted Rule 19b-3, 17 C.F.R. § 240.19b-3, mandating competitive rates. Congress took parallel action, enacting the Securities Acts Amendments of 1975, which barred registered national securities exchanges from fixing commission rates. 89 Stat. 107, 15 U.S.C. § 78f(e). Since the effective date of SEC Rule 19b-3 and enactment of the Securities Acts Amendments of 1975, no Exchange rule has fixed commission rates, prohibited rebates or barred in any way the sharing of commissions by members with non-members, whether broker-dealers or customers.

REASONS FOR DENYING THE WRIT

The petition, which deals with an Exchange rule long since defunct and superseded by statute and by SEC rule, presents no questions of law of general or current importance. There is nothing left to enjoin. Petitioners' attack on the wisdom of the SEC's regulatory policy which, during the period in question, permitted the anti-rebate rule in order to prevent evasion of the fixed commission rule, presents no question for review by this Court. The decision below faithfully applied the comprehensive and controlling legal precepts delineated by this Court in *Gordon:* that exemption from antitrust attack exists where, as here, there was statutory authorization for, and active exercise of, SEC jurisdiction over the challenged Exchange activity. Petitioners' invitation to this Court to delve into the record to resolve alleged issues of fact is not a ground for certiorari.

ARGUMENT

I.

The Decision Below Is Wholly In Accord With This Court's Decision in *Gordon*.

The petition raises no special or important reasons for review of the decision below. In contending that the Exchange's anti-rebate rule, which was abolished nearly six years ago, should not be exempt from antitrust attack, petitioners simply disagree with this Court's decision in *Gordon*.

In *Gordon*[1] this Court laid down the legal tests of antitrust exemption for Exchange rules. The Court of Appeals held that those tests had been met in this case. Its decision is in accord with the decisions of other courts applying the *Gordon* analysis. For example, in *Abbott Securities Corp. v. New York Stock Exchange,* 384 F.Supp. 668 (D.D.C. 1974), & 1976-2 Trade Cas. (CCH) ¶ 61,017 (D.D.C. 1976), *aff'd,* 569 F.2d 159 (D.C.Cir. 1977), non-member broker-dealers challenged the Exchange's 1968 prohibition of customer-directed give-ups and other rules, alleging unlawful denial by the Exchange of "economic access" to its market. On the basis of *Gordon* the District Court determined that fixed commission rates are impliedly exempt from antitrust attack and that "the issue of economic access for non-member broker-dealers is inextricably intertwined with the practice of fixing commission rates." 384 F.Supp. at 670. The Court thus granted summary judgment for

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[1] *Gordon* decided the question left open in *Silver v. New York Stock Exchange,* 373 U.S. 341 (1963), in which this Court, twelve years earlier, had rejected the notion of *per se* liability for those Exchange self-regulatory activities not subject to SEC oversight, establishing instead a rule of reason approach to the antitrust legality of such activities. Because the conduct involved in *Silver*—withdrawal of private wire connections without a hearing—was neither specifically contemplated by the Exchange Act nor subject to SEC oversight jurisdiction, this Court reserved the question of exemption where challenged self-regulatory conduct was within the scope and purposes of the Act and subject to SEC review. *Gordon* squarely presented this Court with the issue reserved in *Silver.*

the Exchange and the Court of Appeals for the District of Columbia summarily affirmed. 569 F.2d 159 (D.C. Cir. 1977). *See also Shumate & Co. v. New York Stock Exchange, Inc.*, 486 F.Supp. 1333 (N.D. Tex. 1980). *Cf. Independent Broker-Dealers' Trade Association v. SEC*, 442 F.2d 132 (D.C.Cir.), *cert. denied*, 404 U.S. 828 (1971).

Petitioners argue that the Court of Appeals erred in applying the *Gordon* principles of laws to particular facts of this case. But this Court does not "sit for the benefit of the particular litigants" and will grant certiorari only in those cases "'involving principles the settlement of which is of importance to the public as distinguished from that of the parties.'" *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74, 79 (1955), *quoting Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

In arguing that the anti-rebate rule constituted a *per se* violation of the antitrust laws petitioners rely on cases dealing with access to markets or facilities in nonregulated industries (Pet., pp. 7 *et seq.*). These cases are inapposite to the tests for implied antitrust exemption in an industry governed by a regulatory statute and subject to the oversight of a regulatory agency. In any event, the notion of *per se* liability with respect to Exchange self-regulatory activities pursuant to the Exchange Act was long ago put to rest by this Court. *Silver, supra*, 373 U.S. at 348-49.

II.

This Court Will Not Sift the Record to Resolve Various Alleged "Factual Tests for Antitrust Immunity".

The petition argues (p. 17) that "[t]here are significant factual inquiries that remain, all of which, on this record, must be resolved against the NYSE and against antitrust immunity." But in *Gordon, supra*, this Court held that the questions determinative of antitrust exemption are questions of law, not of fact. 422 U.S. at 687.

In any event, the Court of Appeals accepted as against a "clearly erroneous" attack (Fed. R. Civ. P. 52(a)) the District Court's pivotal finding that the anti-rebate rule was an integral part of the former fixed commission rate system. The Court's determination that there was statutory authorization for SEC review of the challenged rule, given the rule's integral relationship with the system of fixed minimum commissions, was supported by extensive trial testimony of witnesses called by the Department of Justice. Indeed, the Court of Appeals noted that the anti-rebate rule "in fact is simply descriptive clauses in the very Exchange rule providing for the fixed rates." 633 F.2d at 69. Record evidence also established overwhelmingly the actual and continuing exercise by the SEC of its oversight jurisdiction. 633 F.2d at 69-70. *See also* 473 F.Supp. at 1368-70.

Petitioners nevertheless apparently ask this Court to embark on a *de novo* review of the record in order to set aside the District Court's findings of fact relating to both statutory authorization for, and actual exercise of, SEC oversight jurisdiction. Certiorari is not granted for this purpose. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925). *See United States v. General Dynamics Corp.,* 415 U.S. 486, 508 (1974); *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 123 (1969).

There is no basis to the suggestions that the anti-rebate rule was applied discriminatorily and antitrust exemption was thereby "waived" (Pet., p. 19). Not only did petitioners fail even to attempt to prove the factual proposition of discriminatory application at trial, but the uncontested evidence in the record is that the Exchange enforced the anti-rebate rule without any discrimination whatsoever. The contrary is not established by petitioners' attacks on reciprocal and give-up practices indulged in by brokers but not mandated by Exchange rule.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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February 18, 1981

APPENDIX

August 1, 1975

Honorable John W. Reynolds
Chief Judge
United States District Court
Eastern District of Wisconsin
471 Federal Building
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Re: *Thill Securities Corp. v. New York Stock Exchange, Civil No. 63-C-264*

Dear Judge Reynolds:

This is to inform you that the United States does not oppose dismissal of the Intervenor's Pleading in the above-captioned matter filed April 28, 1972. The Court granted leave to the United States to intervene on June 16, 1972.

This action is being taken in light of the decision of the United States Supreme Court in *Gordon* v. *New York Stock Exchange,* No. 74-304, decided June 26, 1975, and the Securities Acts Amendments of 1975, P.L. 94-29, enacted June 5, 1975. We believe that in light of these two intervening events the injunctive relief requested by the United States at the conclusion of the trial in this case in 1973 is no longer necessary or appropriate. For this reason, we believe no useful purpose would be served by continuing the involvement of the United States in this lawsuit.

We wish to emphasize that in our view the *Gordon* decision in no way overrules or limits the decision in *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963) with respect to antitrust jurisdiction for activities of securities exchanges not subject to the jurisdiction and review of the Securities and Exchange Commission. In addition, as noted in our Post Trial Brief dated May 1, 1973, "It was not the purpose of the United States in intervening in this lawsuit either to increase the likelihood that the plaintiff class would obtain substantial damages or to aid the defendant in avoiding damages." (p. 209) We continue to adhere to that view and therefore take no position with respect to the appropriateness of granting any relief to the plaintiff and the class he represents based upon the Supreme Court's discussion of this case in its opinion in *Gordon.*

Respectfully yours,

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